No. 93-133

AUG 27 1993

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

MAXIMILLIAN ROBERTO SEALE,

Petitioner,

v.

STATE OF UTAH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

JAN GRAHAM
Attorney General of Utah
ANNINA M. MITCHELL
(Counsel of Record)
Assistant Attorney General
124 State Capitol
Salt Lake City, Utah 84114
(801) 538-1021

Attorneys for Respondent

BEST AVAILABLE COPY

AUG 27 1993

No. 93-133

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

MAXIMILLIAN ROBERTO SEALE,

Petitioner,

v.

STATE OF UTAH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

JAN GRAHAM
Attorney General of Utah
ANNINA M. MITCHELL
(Counsel of Record)
Assistant Attorney General
124 State Capitol
Salt Lake City, Utah 84114
(801) 538-1021

Attorneys for Respondent

QUESTION PRESENTED FOR REVIEW

Should this Court review the Utah Supreme Court's unanimous determination that trial counsel represented Petitioner effectively by pursuing an alternative insanity defense in light of definitive expert opinion, documented before arraignment, that Petitioner was delusionally mentally ill at the time of the alleged acts of rape and aggravated sexual abuse of a child?

TABLE OF CONTENTS

Page

OPINION BELOW 1

CONSTITUTIONAL PROVISIONS AND STATUTES . 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 14

ARGUMENT

I. TRIAL COUNSEL'S PURSUIT OF INSANITY AS AN ALTERNATIVE DEFENSE WAS A REASONABLE STRATEGIC CHOICE IN LIGHT OF THE EXTENSIVE EXPERT OPINION DOCUMENTING, BEFORE ARRAIGNMENT, SEALE'S SERIOUS DELUSIONAL MENTAL ILLNESS AT THE TIME OF THE ALLEGED OFFENSES 15

A. Trial counsel prepared and presented an insanity defense conforming to current Utah law 15

B. Trial counsel litigated an insanity defense adequately supported by the evidence at trial 20

II. SEALE CANNOT BASE AN INEFFECTIVENESS CLAIM ON A PURPORTED CONFLICT WITH TRIAL COUNSEL OVER DEFENSE STRATEGY, A FACTUAL CONTENTION THAT IS NOT SUPPORTED, BUT BELIED, BY THE RECORD 21

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Page

Alvord v. Wainwright, 469 U.S. 956 (1984) 21

Bethea v. United States, 365 A.2d 64 (D.C. Cir. 1976), cert. denied, 433 U.S. 911 (1977) 20

Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) 19

State v. Bullock, 791 P.2d 155 (Utah 1989), cert. denied, 497 U.S. 1024 (1990) 13

State v. Green, 78 Utah 580, 6 P.2d 177 (1931) 16

State v. Knoll, 712 P.2d 211 (Utah 1985) 16, 20

State v. Medina, 738 P.2d 1021 (Utah 1987) 23

State v. Seale, 207 Utah Adv. Rep. 10 (Utah 1993) 1

State v. Smith, 700 P.2d 1106 (Utah 1985) 23

State v. Starks, 627 P.2d 88 (Utah 1981) 16

State v. Wulffenstein, 657 P.2d 289 (Utah 1982), cert. denied, 460 U.S. 1044 (1983) 23

Strickland v. Washington, 466 U.S. 668 (1984) 13

Sunal v. Large, 332 U.S. 174 (1947) 24

Tillery v. United States, 419 A.2d 970 (D.C. Cir. 1980) 19, 20, 21

United States ex rel. McCann v. Adams, 320 U.S. 220 (1943) 24

United States v. Carlson, 561 F.2d 105 (1st Cir.), cert. denied, 434 U.S. 973 (1977) 23

United States v. Innella, 690 F.2d 834 (11th Cir. 1982), cert. denied, 460 U.S. 1071 (1983) 23

United States v. Lutz, 621 F.2d 940 (9th Cir.), cert. denied, 449 U.S. 859 (1980) 23

United States v. Rhoads, 617 F.2d 1313 (8th Cir. 1980) 21

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. VI 1

Utah Code Ann. § 76-2-102 (1990) 16

Utah Code Ann. § 76-2-103 (1990) 17

Utah Code Ann. § 76-2-305 (Supp. 1993) 1, 12, 15, 16, 21

Utah Code Ann. § 76-2-308 (1990) 16

Utah Code Ann. § 76-5-402.1 (1990) 2, 16

Utah Code Ann. § 76-5-404.1 (1990) 2, 17

Utah Code Ann. § 77-14-4 (1990) 16

Utah Code Ann. §§ 77-15-3, -5 (1990) 4

OPINION BELOW

The opinion and judgment of the Utah Supreme Court, unofficially reported as State v. Seale, 207 Utah Adv. Rep. 10 (Utah 1993), is reprinted as Appendix A to the Petition for a Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defence.

Utah Code Ann. § 76-2-305(1)-(3) (Supp. 1993):

> (1) It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense.
>
> (2) The defense defined in this section includes the defenses known as "insanity" and "diminished mental capacity."
>
> (3) A person who is under the influence of voluntarily consumed or injected alcohol, controlled substances, or volatile substances at the time of the alleged offense is not excused from criminal responsibility on the basis of mental illness.

Utah Code Ann. § 76-5-402.1(1) (1990):

> (1) A person commits rape of a child when the person has sexual intercourse with a child who is under the age of 14.

Utah Code Ann. § 76-5-404.1(1) (1990):

> (1) A person commits sexual abuse of a child if . . . the actor touches the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise takes indecent liberties with a child, or causes a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant.

STATEMENT OF THE CASE

In the spring of 1987, Alice W. and her three daughters, J.W., P.W., and one younger girl, began living with Petitioner Seale in Washington, Utah (Trial Transcript [hereafter T.T.] 148-49). Alice and the girls moved out of Seale's home in January 1989 (T.T. 149).

In July 1989, the girls were staying for a few weeks with their natural father, Randy W., who lived with his sister and her children in Jerome, Idaho (T.T. 123). Randy's sister, Cheryl VanLeishout, became concerned because J.W., then eleven, was moody and upset and did not want to return to her mother (T.T. 136-37). Cheryl talked to J.W. and asked

her why (T.T. 136-37). At first J.W. was reluctant to talk,[1] but eventually she told Cheryl that, when they were living in the same house, Seale had put his "bottom" in hers, that he had bathed her with a cloth, and that he had "sucked her boobies" (T.T. 68, 139).

Cheryl told her brother, Randy, and they asked ten-year-old P.W. if anything had happened to her. P.W. was shy and would only say Seale "didn't do as much to her as he did to" J.W. since "[h]e just used his fingers and his tongue."

---

[1] At trial, J.W. explained her initial reluctance to tell what had happened to her:

> Q. Why wouldn't you?
> A. Because I was scared.
> Q. Scared of what?
> A. Of getting in trouble.
> Q. Getting in trouble with whom?
> A. Max and my mom.
> Q. Why would you be afraid of Max or afraid of your mother?
> A. Because my mom told me to keep it within just the family.
> Q. Did Max tell you anything?
> A. No.
> Q. Are you afraid of Max?
> A. No.
> Q. Were you afraid of Max at that time?
> A. Yes.
> Q. Why aren't you afraid of Max now?
> A. Because I know he can't hurt me.

(T.T. 67-68).

(T.T. 140).[2] Cheryl took J.W. to be examined by Dr. Elizabeth Sugden a few days later (T.T. 140; State's Ex. 2). On July 7, 1989, J.W. and P.W. were separately interviewed by Mary Riggs, a social worker and protective services investigator in Jerome, Idaho, in the presence of police officer Patricia Ward (T.T. 92). These interviews were videotaped (T.T. 94; State's Ex. 1).

Seale was formally charged in July 1989 with multiple first-degree felonies, including one count of rape of a child, J.W., and six counts of aggravated sexual abuse of a child, two involving J.W. and four involving P.W. (R. 5, 131-34). Against the advice of his attorney at that time, Wright,[3] Seale waived a preliminary hearing and was bound over to district court (R. 21-22). The next month Seale, through attorney Wright, requested an order committing him to the Utah State Hospital, a mental institution, pursuant to Utah Code Ann. §§ 77-15-3 to -5 (1990), for an evaluation of whether he was mentally competent to stand trial (R. 29-31).

The examiners' tests and evaluations concluded Seale was suffering from bizarre delusions and a severe schizo-affective disorder coupled with a mood disorder. For example, Seale claimed he was born as an Indian and raised

---

[2] The jury was promptly cautioned that these remarks to Cheryl were not offered to prove the truth of the contents of the statements, but to show what prompted the initial investigation (T.T. 138).

[3] Contrary to the impression created by Petitioner, there were two different attorneys involved in his defense. Trial counsel, Winchester, whose effectiveness was challenged on direct appeal to the Utah Supreme Court, did not begin representing Seale until April 1990, after Seale had been treated with psychotropic drugs in the state mental institution for more than six months.

alone on an island by Brook Woman, not his parents, whom he claimed not to know. In fact, he was raised by his non-Indian natural parents in southern California (R. 36 at 3). In addition, Seale claimed to be doing investigative work for the heir to the Bennett Paint Company fortunes, whom he always listed as his father, that would result in his obtaining ten percent of the $150 million possible recovery in the case (R. 36 at 4). Seale also insisted that, as a nine-year-old underwater demolition expert for the Navy, he had learned to breath under water for up to four minutes (R. 36 at 3).

Seale was found incompetent to stand trial and was committed to the Utah State Hospital (R. 38-39). In February 1990 he was released from the hospital after doctors there concluded that, due to treatment with a mood stabilizer and antipsychotics, his delusional thinking had resolved and he was competent to proceed to trial (R. 43). On March 7, 1990, the State moved for recommitment to assess again Seale's competency to stand trial, as well as to assess his mental status at the time of the charged offenses. At the commitment hearing, Seale was personally addressed by the trial judge "as to his understanding of the proceedings," to which "[Seale] responded in the affirmative." With the concurrence of attorney Wright, Seale was sent to the Utah State Hospital for reevaluation (R. 46-47, 53).

Numerous interviews with Seale's close family members revealed a "marked change in [his] functioning and mental status sometime around 1980" (R. 59 at 10). Based on these and the medical staff's diagnostic evaluations and treatment observations, Drs. Howell and Washburn concluded in their thirteen-page report of March 28, 1990, that Seale had been mentally ill since the spring of 1981 and continuing through 1987 and 1988, when the alleged acts of rape and

sexual abuse occurred. Their diagnosis was schizoaffective disorder or bipolar mood disorder, either of which could have been aggravated by, or caused by, marijuana and Indian "medicine man" hallucinogens, which Seale and other family members told them he used (R. 59 at 3, 11, 13-15).

In the examiners' opinion, this mental illness had worsened from the time of onset in 1981 until Seale's first hospital admission in August 1989 (R. 59 at 3).[4] They also concluded that, due to ongoing treatment with antipsychotics, Seale's delusional mental illness was in remission, and he remained competent to stand trial (R. 59 at 4).[5]

On April 4, 1990, attorney Wright was allowed to withdraw as defense counsel and a retained attorney, Winchester, was formally substituted (R. 55, 57). See note 3, supra. At Winchester's request a preliminary hearing was held the next month, and three of the original counts were dismissed (R. 68). At arraignment, Seale entered a plea of "not guilty" and an alternative plea of "not guilty by reason of insanity" (Tr. of June 6, 1990, at 2, 7; R. 86). Attorney Winchester thereafter made numerous pretrial motions in limine and a motion to dismiss several more counts (R. 89, 93).

---

[4]This second report was sent to trial counsel Winchester, along with the 1989 competency evaluations and supporting documentation (R. 59 at 4).

[5]At Seale's request, he was permitted to remain at the Utah State Hospital until trial (R. 59 at 4; R. 60).

At trial in August 1990, twelve-year-old J.W. was the first State's witness. She said that she was then living with her father in Idaho,[6] but that she had lived with her mother and her mother's boyfriend, Maximillian Seale, a few years before (T.T. 51). She said Seale had abused her while they were living in the same house (T.T. 52). When asked what he did, J.W. related in detail three specific incidents. After the first, in which Seale touched her "bottom" while she was bathing (T.T. 52-53), J.W. immediately told her mother. Alice made her "hug and make up" with Seale (T.T. 54-55).

The next incident occurred when the girls were sleeping on the living room floor. "Max came in. He pulled down my panties and put his bottom in mine and then sucked my boobies" (T.T. 56).[7] After J.W. told her mother what had happened, they talked together with Seale about what he had done, and Seale told J.W. "he wouldn't do it no more" (T.T. 57). In the third incident within several days, defendant sent J.W. to the unfinished attic. There, he pulled down her panties and touched her "bottom" with his fingers. She protested, and he desisted (T.T. 58-59, 62). When J.W. again told Alice, her mother's only response was that the girl had done the right thing by telling Seale "no" (T.T. 61).

J.W. then told the jury how she had eventually revealed these things to her Aunt Cheryl and explained that she was at first scared to talk about it because her mother had

---

[6]According to Alice W., an Idaho court had awarded a change of custody of J.W. to Randy W. at some unspecified time between July 1989 and August 1990 (T.T. 153).

[7] On cross-examination, J.W. explained that when she referred to Seale's "bottom," she meant his "dick" (T.T. 76).

told her to keep it within just the family (T.T. 67-68). See note 1, supra.

Eleven-year-old P.W. took the stand next. Asked if she knew the difference between a bad touch and a good touch, P.W. responded it would be a bad touch if somebody touched you where your bottom is (T.T. 84). Asked if anyone had ever touched her in a bad touch, P.W. responded, "I don't know." She then proceeded to answer "I don't remember" to every question about whether Seale had touched her and whether she had told anyone about it (T.T. 84-89). After cross-examination by Winchester, she was excused (T.T. 90).

According to Dr. Sugden's testimony, received into evidence by way of proffer based on the parties' stipulation, J.W. said that Seale had sexual intercourse with her. Dr. Sugden's examination of J.W. revealed an enlarged vaginal introitus, a condition consistent with those allegations. The doctor believed the enlargement could have occurred at any time between two weeks and several years before the examination and could have been caused by any enlarged object (State's Ex. 2; T.T. 128-30).

After Cheryl VanLeishout recounted for the jury the events that took place in Idaho in July 1989, set forth above, Alice W. testified. She denied J.W. told her of any of the three incidents, although she admitted J.W. once complained that Seale "did an Indian dance over her while . . . he thought she was asleep" and had fondled her breasts (T.T. 150-58). Alice was afraid a court would change custody of P.W. to her ex-husband (T.T. 153), but she claimed she would not encourage P.W. to forget things that had happened in the home in order to keep her (T.T. 154).

Asked if her sister, Elizabeth Jones, had ever expressed concern that Seale was doing things to the children), Alice replied, "She never said nothing to me." (T.T. 154-55). Alice denied that she had called her sister Elizabeth the previous night and asked her to lie in court (T.T. 160).

Elizabeth Jones next testified that J.W. and P.W. frequently visited her during the time they lived with Alice and Seale (T.T. 161-62). Asked if she remembered them saying anything to her about Seale, Elizabeth replied, "Yeah. They said--talked about him several times. Mainly when it was time for them to go home, and they was scared to go home" (T.T. 162). Elizabeth related that J.W. was afraid to go home because Seale would get her alone and had "touched her bottom" and her breasts, and that J.W. said she had told Alice about it (T.T. 178, 182). On the same occasion, P.W. told Elizabeth she was also afraid of Seale and that he had touched her (T.T. 179, 185). Elizabeth told Alice this when she took the girls home and said Seale was hurting the girls, but "Alice just laughed it off," denied it had happened, and said Elizabeth "didn't know what she was talking about" (T.T. 178-79, 181). The girls' complaints prompted Elizabeth to call Social Services and make an anonymous report of sexual abuse (T.T. 190, 291). Finally, Alice had called Elizabeth the day before and asked her not to say anything in court (T.T. 193-94).

After legal arguments, additional witness testimony, and a ruling on its reliability, the videotape of P.W.'s July 1989 interview by social worker Riggs was shown to the jury (T.T. 197-200, 205). According to P.W., three separate times Seale had touched her in places she showed Riggs and identified as her "bottom" and the place between her legs in her "privates" and "private spots" (State's Ex. 3 at 11-12, 15-

16). P.W. related a fourth incident when Seale lured her to his bedroom with a piece of candy, pushed her down on the bed, and fondled her "privates" with his fingers for ten minutes (Id. at 22-25). P.W. told her mother about this after they had moved away from Seale's house, but not while they still lived with him "[b]ecause he might do it again," as he had threatened (Id. at 25-26). In response, her mother ignored her (Id. at 27). At this point, the State rested.

The defense called Dr. Robert Howell from the Utah State Hospital,[8] whose testimony Petitioner misstates. Dr. Howell testified that in August 1989 Seale had a serious mental illness (schizophrenia plus manic depression) involving delusions and mood swings (T.T. 230-31). Dr. Howell said Seale had been considered incompetent to stand trial then, but had been found competent by early 1990 after months of treatment with mood stabilizing and antipsychotic drugs (T.T. 232-34).

Dr. Howell reviewed for the jury the results of the 1989 and 1990 interviews and evaluations performed to diagnose Seale's illness and assess his mental condition at the time of the alleged offenses. He related the dramatic changes in Seale's behavior, manner of speech, and level of functioning after 1980 described by Seale's mother and other family members that were consistent with his observed delusional thinking in 1989 (T.T. 249-52). Dr. Howell concluded Seale had been suffering from a schizoaffective disorder perhaps as far back as 1981, but at least since 1985 (T.T. 237-39, 249). In his professional opinion, Seale was already seriously mentally ill in 1987 and 1988 (T.T. 230-31,

---

[8]The defense recalled Riggs for cross-examination about the videotape (T.T. 207-10), but did not recall P.W. for that purpose.

235-39, 252, 260).

Significantly, Dr. Howell stressed that Seale had consistently denied the acts of which the two girls accused him and that Seale's diagnosed mental illness would not make him more likely to commit child sexual abuse (T.T. 237, 241).

On cross-examination, Dr. Howell insisted there was a real possibility Seale's actions were the result of his mental illness, although he admitted that if Seale had used marijuana or hallucinogens--which Seale denied to Howell, but several family members had told him of--a similar behavior pattern could result (T.T. 251-55).

According to Dr. Howell, the diagnosis of schizoaffective disorder would not alone tend to show one way or the other whether Seale could form the intent to commit the offenses with which he was charged (T.T. 241). Asked if Seale was capable of forming the intent to commit the alleged offenses, Dr. Howell expressed his doubts, stating he believed Seale's intent was possibly the result of mental illness (T.T. 244-45). He testified he was unsure if Seale was capable of forming a conscious objective to carry out his own acts (T.T. 259-60).

Seale then took the stand. He expressed interest in Indian folklore, but denied using illegal drugs, except for one use of marijuana in 1978 at a doctor's suggestion and one feigned use while working on the Mexican border (T.T. 271-74, 282, 290). He denied ever being mentally ill (T.T. 274-75). He also adamantly denied having intercourse with J.W., as well as each alleged act of touching P.W.'s or J.W.'s genital area (T.T. 278-79, 289).

On rebuttal, J.W. testified that defendant and her mother had smoked "pot" rolled into cigarette papers on a weekly basis (T.T. 293-96).

The jury was instructed that they should return a verdict of not guilty if the state had failed to prove beyond a reasonable doubt each element of a charged crime (R. 154). The jury was then instructed that one such element of the crime of rape of a child is "[t]hat the Defendant acted intentionally or knowingly" (R. 149) and that, as an element of sexual abuse of a child, the State must prove that the defendant acted "[w]ith intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person . . . ." (R. 151).[9]

The jurors were also instructed that a verdict of "not guilty by reason of insanity" meant that "you are not convinced beyond a reasonable doubt that the defendant possessed the mental state required as an element of the offense charged as a result of mental illness." (R. 157). Instruction 18, echoing the relevant provisions of Utah Code Ann. § 76-2-305(1) and (3) (Supp. 1993), told the jurors it is a defense to a prosecution if, as a result of mental illness, a defendant lacked the mental state required as an element of the offense, but that a person voluntarily under the influence of drugs or alcohol at the time of the alleged offenses is not excused from criminal responsibility on the basis of mental illness (R. 158).

---

[9]Jury Instruction 15 defined "intent" as "intention, design, resolve, a determination of the mind" (R. 155). The jurors were told that a person acts intentionally with respect to the nature of his conduct or to a result of his conduct "when it is his conscious objective or desire to engage in the conduct or cause the result" (Id.).

In closing argument, trial counsel contended, first, that the issue for the jury was whether the little girls had told the truth and whether their stories were backed up by competent evidence from other people (T.T. 308). He pointed out improbable details in the girls' stories, as well as inconsistencies in the timing of the alleged acts and in reports of those acts to others (T.T. 308-12). He attacked the reliability of the story told by P.W. in the videotape, pointing out that she was not subjected to cross-examination during that interview (T.T. 313). Finally he argued that, even if the jury believed the girls, Dr. Howell's testimony had raised a reasonable doubt about whether Seale, as a result of mental illness, lacked the intent element of the offenses charged (T.T. 314-16).

The jury found Seale guilty on all seven counts (R. 178-85), and he was sentenced in early 1991 (R. 240-44).

On direct appeal, the Utah Supreme Court considered and rejected challenges to the convictions based on claims of insufficient evidence; of a Confrontation Clause violation; and of reversible errors in the reliability determination and in several evidentiary rulings (Pet. App. A31, A34-40, A46). The Utah Supreme Court also rejected Seale's Sixth Amendment claim that trial counsel was ineffective for asserting an insanity defense (Pet. App. A14).

Applying the test from Strickland v. Washington, 466 U.S. 668, 690 (1984), the unanimous state panel held that Winchester's choice of defense strategy, under the circumstances facing him, was a legitimate exercise of professional judgment that did not fall below the standard of reasonable professional assistance (Pet. App. A14, citing State v. Bullock, 791 P.2d 155, 160 (Utah 1989), cert. denied, 497

U.S. 1024 (1990)). The court relied on the extensive documentation and professional opinion regarding Seale's serious mental illness from before 1987 through the time of trial (Pet. App. A14-A15). The court concluded that a reasonable attorney could choose to pursue an insanity defense by using Dr. Howell's testimony about Seale's long-term mental illness and its affect on his mental state at the time of the charged criminal acts (Pet. App. A15).

The Utah Supreme Court refused to consider Seale's ineffectiveness claim based on his purported opposition to entry of an alternative plea of "not guilty by reason of insanity" and to advancement of this alternative defense at trial, finding no support in the record for his belated factual contentions (Pet. App. A16-A17).

SUMMARY OF ARGUMENT

The Utah Supreme Court's determination that Seale was not denied his Sixth Amendment right to the effective assistance of counsel does not conflict with any other appellate decision. Trial counsel's advancement of insanity as an alternative defense was a reasonable exercise of professional judgment in light of the compelling evidence available to him documenting Seale's severe delusional mental illness at the time of the alleged offenses. Furthermore, trial counsel competently prepared, presented, and argued an insanity defense that was consistent with current Utah law and supported by adequate evidence.

The Utah Supreme Court did not rule on an important federal constitutional question concerning a criminal defendant's waiver of any right to control his own defense. Instead, following a well-established principle of appellate practice, the court refused to decide Seale's alternate ineffectiveness claim because it was premised on factual contentions--of conflict with counsel over defense strategy--that are unsupported by the record.

Because Seale has not shown any conflict or uncertainty in federal law created by the ruling of the Utah Supreme Court on his Sixth Amendment claims, this Court should deny his Petition for a Writ of Certiorari.

ARGUMENT

I. TRIAL COUNSEL'S PURSUIT OF INSANITY AS AN ALTERNATIVE DEFENSE WAS A REASONABLE STRATEGIC CHOICE IN LIGHT OF THE EXTENSIVE EXPERT OPINION DOCUMENTING, BEFORE ARRAIGNMENT, SEALE'S SERIOUS DELUSIONAL MENTAL ILLNESS AT THE TIME OF THE ALLEGED OFFENSES.

A. Trial counsel prepared and presented an insanity defense conforming to current Utah law.

Petitioner erroneously states that Utah has eliminated the affirmative defense of insanity (Pet. at 16). Under Utah law since 1983, an accused cannot be convicted of a crime if, "as a result of mental illness, he lacked the mental state required as an element of the offense charged." Utah Code Ann. § 76-2-305(1) (Supp. 1993). This defense, which

encompasses the defenses of insanity and "diminished mental capacity," Utah Code Ann. § 76-2-305(2) (Supp. 1993), is statutorily classified as an affirmative defense. Utah Code Ann. § 76-2-308 (1990). In order to assert this affirmative defense through experts at trial, the accused must provide the prosecution pretrial notice of his intent to claim he is not guilty by reason of insanity. Utah Code Ann. § 77-14-4 (1990).

A criminal defendant in Utah "does not bear the burden of persuasion in presenting an affirmative defense." State v. Starks, 627 P.2d 88, 92 (Utah 1981). Instead, the accused only has the burden of producing "some reasonable" evidence to put at issue his lack of intent due to mental illness. See State v. Knoll, 712 P.2d 211, 215 (Utah 1985); see also State v. Green, 78 Utah 580, 6 P.2d 177, 182 (1931) (insanity an affirmative defense "casting upon the defendant the necessity of going forward with evidence tending to show that he was insane at the time of the alleged crime").

Once this minimal burden of production is met by an accused, the burden of proof shifts to the prosecution to show beyond a reasonable doubt that the affirmative defense does not exist. Knoll, 712 P.2d at 214. Thus, production of "some reasonable" evidence of mental illness resulting in a lack of the intent necessary to convict on the offenses charged requires the State to prove beyond a reasonable doubt--in addition to the usual elements of the offense--that the accused did **not** lack the requisite mental state due to mental illness.

Here, the charged offense of rape of a child required proof by the State that, among other things, Seale acted intentionally or knowingly. Utah Code Ann. § 76-5-402.1(1) (1990); Utah Code Ann. § 76-2-102 (1990). To act

intentionally, it must be one's "conscious objective or desire to engage in the conduct or cause the result." Utah Code Ann. § 76-2-103(1) (1990). The offense of sexual abuse of a child requires proof by the State that, among other things, the defendant acted with "intent to cause substantial emotion or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person . . . ." Utah Code Ann. § 76-5-404.1(1) (1990).

Trial counsel Winchester litigated an insanity defense for Seale completely consonant with these current legal standards. He did not, as Seale contends, present an outdated "substantial capacity" insanity defense that was the law in Utah before 1983 (Pet. at 16-17).

Winchester put forward Dr. Howell's expert testimony that Seale was suffering from his severe delusional disorder at the time of the alleged acts of rape and sexual abuse (T.T. 230-31, 235-39, 252, 260). This opinion was based on Seale's behavioral history, relayed by his close family members, and on the extensive clinical evaluations of Seale by Dr. Howell and other mental health professionals during Seale's six months of residential treatment at the state mental hospital for his schizoaffective disorder (T.T. 230-39, 249-52).

In addition, through examination reflecting his correct understanding of Utah law on the insanity defense, Winchester elicited Dr. Howell's expert opinion questioning whether Seale's mental illness deprived him of the mental state essential for commission of the crimes charged (T.T. 241, 244-45, 259-60), which Dr. Howell expressly stated as the applicable legal standard (T.T. 259). Because of the severely delusional nature of Seale's schizoaffective disorder,

untreated until 1989, Dr. Howell repeatedly stated his serious doubts about whether Seale was, at the time of the alleged acts, capable of having the requisite intent or whether Seale's intent was the product of his mental illness (T.T. 244-45). Dr. Howell, though unwilling to offer an unequivocal opinion, made clear he was uncertain if Seale was capable of forming a conscious objective to carry out his own acts (T.T. 259).

The jury was correctly instructed on the applicable law of the insanity defense in Utah and on the State's burden of proving each element of each crime, including the requisite mental state, beyond a reasonable doubt (R. 149, 151). The jurors were also instructed that Seale did not have the burden of persuasion in presenting a defense (R. 145). They were instructed that a "not guilty" verdict should be returned if any of the enumerated elements of the crime was not proven beyond a reasonable doubt, and that a "not guilty by reason of insanity" verdict meant that they were not convinced beyond a reasonable doubt that the defendant, as a result of mental illness, possessed the mental state required as an element of the offense (R. 157, 159).

Winchester's closing argument to the jury also reveals that he correctly understood the current law of the insanity defense in Utah. First he attacked at length the credibility of the girls' stories about the alleged acts of rape and sexual abuse, consistent with his client's denial--on the witness stand and during interviews with Dr. Howell--that those incidents occurred. Then Winchester briefly argued there was a reasonable doubt raised by Dr. Howell about whether Seale, due to his mental illness at the time, could have had the intent necessary to convict him of the charged offenses:

> [By Defense Counsel:] Does Max's schizoaffective disorder, as diagnosed by Dr. Howell and his colleagues . . . prevent him from having the mental state required by the law? . . . .
>
> I submit to you that the question raised by the only expert who's qualified to tell us Max Seale's mental state of mind is sufficient for you to find a reasonable doubt as to the mental element required to each of these offenses. . . . He was unable to form the mental intent required.

(T.T. 314-16).

In contrast, defense counsel in Tillery v. United States, 419 A.2d 970, 973 (D.C. Cir. 1980) was held to have denied his client the effective assistance of counsel because his preparation and presentation of the appellant's insanity defense was grossly incompetent. Counsel in Tillery unreasonably failed to investigate and discover that his client had been hospitalized and treated with psychotropics for diagnosed paranoid schizophrenia just before the prosecution's expert examined the client and concluded he was not mentally ill. As a result, this undiscovered evidence bolstering the sole defense theory of insanity was not presented at trial.

In addition, Tillery's counsel predicated his entire defense strategy on the insanity defense standard in Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954). The Durham standard, under which an accused was not criminally responsible "if his unlawful act was the product of mental

disease or mental defect," had been rejected and replaced in the District of Columbia more than sixteen months before Tillery's trial, in Bethea v. United States, 365 A.2d 64 (D.C. Cir. 1976), cert. denied, 433 U.S. 911 (1977).[10] At trial, Tillery's defense counsel elicited testimony from both sides' psychiatric experts in terms of the Durham "productivity" test, and the court concluded that this use of a judicially rejected legal standard constituted gross incompetence. Tillery, 419 A.2d at 974.

In this case, however, trial counsel Winchester competently prepared, presented, and argued an insanity defense completely consistent with controlling Utah law. Thus, Seale was not deprived of the effective assistance of counsel.

B. Trial counsel litigated an insanity defense adequately supported by the evidence at trial.

Petitioner erroneously asserts there was no evidence presented at trial from which the jury could have concluded that Seale lacked the mental state required as an element of the offense (Pet. at 23). However, Seale was not required to present a prima facie case (Pet. at 17). He was only required to present some reasonable evidence on the insanity defense issue in order to shift to the State the burden of disproving his affirmative insanity defense under section 76-2-305(1) beyond a reasonable doubt. Knoll, 712 P.2d at 214-15. As

---

[10]Under the Bethea standard, a person is not responsible for criminal conduct "if at the time of such conduct as a result of a mental disease or defect he lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law." 365 A.2d at 79.

the Utah Supreme Court expressly noted, Dr. Howell's testimony (detailed above under Point A) "provided sufficient evidence for the insanity defense to be submitted to the jury" (Pet. App. A15). The insanity defense presented by Winchester, far from being illusory as Seale now claims, was more than adequately supported by that evidence.

In sum, given the evidence against Seale and his history of serious delusional mental illness since at least 1985, the Utah Supreme Court correctly determined that Winchester's assertion of an insanity defense was a reasonable and legitimate trial strategy (Pet. App. A15).[11] There is no conflict between the result in Tillery and the Utah Supreme Court's determination that Winchester did not deny Seale his right to the effective assistance of counsel by pursuing an alternative insanity defense in this case.[12]

---

[11]Indeed, if Winchester had failed to raise the insanity defense in the face of Seale's documented history of serious delusional mental illness at the time of the alleged acts, he could have claimed on appeal that Winchester was ineffective for that omission. This dilemma was recognized by the court in United States v. Rhoads, 617 F.2d 1313, 1320 (8th Cir. 1980), which held trial counsel was not incompetent for raising defendant's mental condition as an alternative defense, even though defendant actively opposed it. See also Alvord v. Wainwright, 469 U.S. 956, 961 (1984) (Marshall, J., dissenting from denial of certiorari) (counsel's deference to mentally ill client's refusal to assert insanity defense is "unquestionably inappropriate and constitutionally ineffective").

[12]Under Utah Code Ann. § 76-2-305(3) (Supp. 1993), quoted infra at 2, a defendant's possible use of illegal drugs or alcohol at the time of the alleged offenses is an issue whenever the insanity defense is asserted. This has no independent Sixth Amendment significance, however, if pursuit of the insanity defense is itself an objectively reasonable exercise of professional judgment by defense counsel.

Seale's Petition for a Writ of Certiorari on this basis should, therefore, be denied.

II. SEALE CANNOT BASE AN INEFFECTIVENESS CLAIM ON A PURPORTED CONFLICT WITH TRIAL COUNSEL OVER DEFENSE STRATEGY, A FACTUAL CONTENTION THAT IS NOT SUPPORTED, BUT BELIED, BY THE RECORD.

Seale argues he was denied the effective assistance of counsel because of a fundamental conflict with Winchester over the defense strategy to be employed. Seale claims he only wanted to advance a single defense theory, namely, that the alleged acts of rape and sexual abuse did not take place. Trial counsel, however, compelled him to enter an alternative plea of "not guilty" or "not guilty by reason of insanity" and pursued the alternative insanity defense at trial against Seale's wishes (Pet. at 17, 25, 30).

The Utah Supreme Court dismissed these belated allegations as "untenable," finding nothing in the record to support Seale's self-serving contentions on appeal that he disagreed with or opposed trial counsel's use of insanity as an alternative defense (Pet. App. A16-A17).

On the contrary, as the court pointed out, the record belies Seale's after-the-fact contentions. Seale did not object to trial counsel's oral request at arraignment for entry of the alternative plea, he knowingly signed the written plea affidavit stating his alternative plea to the charged offenses, and he initialled the specific paragraph setting forth the alternative plea (Pet. App. A16; R. 86; Tr. of June 6, 1990, at 2, 7). Furthermore, throughout the entire presentation and argument of the alternative defenses at trial, there was no

indication by Seale that he objected to the chosen defense strategy until after it proved unsuccessful.

The Utah Supreme Court did not hold that Seale's silence constituted waiver of his right to control the theory of his own defense or that counsel can impose an insanity defense on his or her client (Pet. at 14, 31-34). Rather, the court concluded it could not consider this alternate Sixth Amendment ineffectiveness claim since it was based on alleged "facts"--i.e., that trial counsel imposed the insanity defense on Seale, contrary to his desires--not supported by the record.

This holding is consistent with prior Utah case law. E.g., State v. Medina, 738 P.2d 1021, 1023 (Utah 1987) (refusing to consider after-the-fact claim of conflict with defense counsel where such disagreement was not apparent on the record); State v. Smith, 700 P.2d 1106, 1109 (Utah 1985) (declining to rule on a "question which depends for its existence upon alleged facts unsupported by the record"); State v. Wulffenstein, 657 P.2d 289, 293 (Utah 1982) (same), cert. denied, 460 U.S. 1044 (1983). It is also entirely consistent with the settled law of appellate practice in the federal courts. E.g., United States v. Innella, 690 F.2d 834, 834-35 (11th Cir. 1982) (declining to rule on ineffectiveness claim premised on factual allegations not of record), cert. denied, 460 U.S. 1071 (1983); United States v. Lutz, 621 F.2d 940, 948 (9th Cir.) (refusing to decide issue concerning adequacy of counsel's representation because based on facts outside record), cert. denied, 449 U.S. 859 (1980); United States v. Carlson, 561 F.2d 105, 109 (1st Cir.) (refusing to consider ineffectiveness claim involving judgments about

facts outside record), cert. denied, 434 U.S. 973 (1977).[13]

Thus, the Utah Supreme Court has not decided in this case an important question of Sixth Amendment law that should be addressed and resolved by this Court.

CONCLUSION

For the foregoing reasons, Respondent State of Utah requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted, this 27th day of August, 1993,

JAN GRAHAM
Attorney General of Utah

ANNINA M. MITCHELL
Assistant Attorney General
(Counsel of Record)

Attorneys for Respondent

---

[13]See also Sunal v. Large, 332 U.S. 174, 177 (1947); United States ex rel. McCann v. Adams, 320 U.S. 220, 221 (1943).